The National Guard

Americans at their Best

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OVERVIEW OF THE FREEDOM OF INFORMATION ACT

THE FREEDOM OF INFORMATION ACT

The Freedom of Information Act (FOIA): Any person has a right, enforceable in Court, to copies of Federal Agency records, except to the extent that such records (or portions thereof) are protected from disclosure by one of the nine exemptions.

-- Enacted by 5 USC 552

-- Implemented by DoD 5400.7/AF Supplement (24 June 2002)

-- Implemented by AR 25-55 (1 November 1997)

FOIA MANAGER'S DUTIES (DoD 5400.7-R/AF SUPPLEMENT C1.5.3.7)

- Ensure correctness of FOIA actions
- Control and process FOIAs
- Obtain recommendations from OPR(s)
- Prepare replies to requesters
- Determine processing track (simple/complex)
- Approve/deny request for expedited processing
- Provide interim response
- Provide a reading room
- Provide training
- Review publications for compliance
- Conduct periodic program reviews
- Approve/deny fee waiver requests

FOIA MANAGER'S DUTIES (DoD 5400.7-R/AF SUPPLEMENT C1.5.3.7) CONT

- Make initial decision on chargeable fees
- Collect fees
- Send extension notices
- Submit reports
- Sign "no record" responses
- Give appeal rights
- Reassess a fee category claim
- Reassess a request for expedited processing
- Reassess a request for waiver of fees
- Review a fee estimate
- Confirm a "no records" response
- Acts as POC for web page

OFFICE OF PRIMARY RESPONSIBILITY/RECORDS CUSTODIAN (DoD 5400.7-R/AF SUPPLEMENT C1.5.3.6.1 AND AR 25-55, PARA 5-104)

OPR provides recommendation to Release/Deny Records

-- Did OPR cite an exemption and reason for denial/partial denial?

-- Did OPR provide every record?

-- Did OPR provide a highlighted copy of the records recommended for denial/partial denial?

LEGAL REVIEW

- Required by DoD 5400.7-R/AF Supplement, paragraph C1.5.3.4 and AR 25-55, paragraph 5-104.

- Exemptions used

- Standard of Review - Established by DoJ and DoD Directorate for Freedom of Information and Security Review

- Discretionary versus Non-Discretionary

EXEMPTIONS

- 5 U.S.C. 552(b)(1) - Classified
- 5 U.S.C. 552(b)(2) - Internal Personnel Rules & Practices
- 5 U.S.C. 552(b)(3) - Other Statutes
- 5 U.S.C. 552(b)(4) - Trade Secrets or Commercial or Financial Information Received on a Privileged or Confidential Basis
- 5 U.S.C 552(b)(5) - Deliberative Process Privilege
- 5 U.S.C. 552(b)(6) - Personal Information
- 5 U.S.C. 552(b)(7) - Law Enforcement
- 5 U.S.C. 552(b)(8) - Financial Institutions
- 5 U.S.C. 552(b)(9) – Geological Data on Wells

EXEMPTION (b)(1): CLASSIFIED RECORDS

Applies to information which is currently and properly classified in the interest of national defense or foreign policy (pursuant to E.O. 12958 as amended and implementing regulations).

- **FOUO is not a security classification. FOUO information is not necessarily exempt from FOIA via exemptions 2-9.**

EXEMPTION (b)(2): INTERNAL PERSONNEL RULES AND PRACTICES OF THE AGENCY

- **High: Operating rules, guidelines and manuals for investigators, auditors, and examiners. Examination questions and answers used for training, employment, or promotion**

- **Low: Parking facility rules, lunch hours rules, sick leave policy. (DoD does not invoke.)**

EXEMPTION (b)(3): NOT RELEASABLE IAW OTHER STATUTES

Examples include:

- Procurement Integrity Act: 42 USC 423
- Sensitive, Overseas, and Deployable Units: 10 USC 130b
- Quality Assurance Records: 10 USC 1102

(The DoD Office of Freedom of Information and Security Review sends out a memo (usually each year) which lists Exemption 3 statutes invoked by DoD.)

EXEMPTION (b)(4): TRADE SECRETS OR COMMERCIAL OR FINANCIAL INFORMATION RECEIVED ON A PRIVILEGED OR CONFIDENTIAL BASIS

- Trade secrets and commercial/financial information in loans, bids, or contractor proposals
- Statistical data concerning contract performance, income, profits, losses and expenditures
- Personal statements in inspections, investigations, audits that reveal company trade secrets

EXEMPTION (b)(5): DELIBERATIVE PROCESS

Applies to inter-agency and intra-agency memoranda which are deliberative in nature and involved in the decision-making process

- **Examples:**
  - **Non-factual parts of after action reports and lessons learned containing evaluations, opinions, or suggestions.**
  - **Planning, programming and budgetary information**

EXEMPTION(b)(5): DELIBERATIVE PROCESS

Examples:

- **Information prepared in anticipation of administrative or litigation proceedings**
- **Information pertaining to attorney work-product, or attorney-client privilege**
- **Advice, suggestions, or evaluations of consultants, boards, committees, groups or commissions**

EXEMPTION (b)(6): PERSONAL INFORMATION IN PERSONNEL, MEDICAL AND SIMILAR FILES

Applies to information that if released, <u>would</u> constitute a clearly unwarranted invasion of privacy

- **Examples:**
  - **Employment applications**
  - **Security clearance records**
  - **Personnel administration or disciplinary actions**
  - **Home address/home phone/SSN/date of birth**

EXEMPTION (b)(7): LAW ENFORCEMENT

Six Parts:

(A) Release could interfere with an open investigation

(B) Release would interfere with a fair trial

(C) Release could reasonably be expected to constitute an unwarranted invasion of personal privacy

EXEMPTION (b)(7): LAW ENFORCEMENT

(D) Release could identify confidential source

(E) Release would reveal investigative technique

(F) Release could cause harm to an individual

EXEMPTION (b)(7): LAW ENFORCEMENT

Not limited to "criminal records." Includes administrative and civil investigative records such as IG, EEOC, MEO, CDI/AR 15-6

- **Identity of agents**
- **Statements of witnesses and their identities**
- **Identity of firms or individuals being investigated**
- **Information obtained during national security background investigations**

OTHER EXEMPTIONS

Exemptions (b)(8): Records for the regulation of financial institutions.

Exemption (b)(9): Records containing geological and geophysical information (including maps) concerning wells.

DOJ's LEGAL STANDARD OF REVIEW

- 12 Oct 01 Memorandum by Attorney General Ashcroft:
  - Supersedes/revokes the foreseeable harm standard issued by Janet Reno in October of 1993.
  - "Sound Legal Basis" standard.
    - Factually on sound footing
    - Legally on sound footing

DISCRETIONARY AND NON-DISCRETIONARY EXEMPTIONS

Discretionary Exemptions: (b)(2), (b)(5), (b)(7)(A),(7)(B), (7)(D), (7)(E), (b)(8),and (b)(9)

- **Non-Discretionary Exemptions: (b)(1), (b)(3), (b)(4), (b)(6), (b)(7)(C) and (b)(7)(F).**

- **Per a 19 November 2001 DoD Directorate for Freedom of Information and Security Review memorandum, discretionary exemptions are no longer encouraged.**

EXEMPTIONS (B)(6) AND (B)(7)(C) PRIVACY STANDARD

Exemption (b)(6): Whether the release "would constitute a clearly unwarranted invasion of personal privacy?"

Exemption (b)(7): Whether the release "could reasonably be expected to constitute an unwarranted invasion of personal privacy?"

A "FIRST PERSON" FOIA/PRIVACY ACT REQUEST

Does the Privacy Act apply?

- If yes, process the request under both acts and release under the act that provides the requester the most information/records.
  - Check for exemptions (general and specific):
    - http://www.defenselink.mil/privacy/notices/usaf
    - http://www.defenselink.mil/privacy/notices/army
- If no, proceed with the FOIA balancing test.

FOIA/PRIVACY BALANCING ANALYSIS

Step 1: Determine what personal privacy interest is involved.

- Names and voices have been protected
- Age, date of birth, marital status, home addresses, home phone numbers, present or future assignments (for overseas routinely deployable units), race, educational level (unless relates to professional qualification), medical record, unsuccessful job applicants, evaluations

FOIA/PRIVACY BALANCING ANALYSIS

Step 1: What is a personal privacy interest?

Common examples of information not protected:

- Names of corporations
- Records pertaining to a deceased person (except for the social security number). However, information pertaining to the deceased person may be protected if the disclosure would rekindle surviving family members' grief.
- Title, duty pay (etc.) of federal employees.

FOIA/PRIVACY BALANCING ANALYSIS

Step 2: What is a "qualified public interest?"

- How would the release of the requested information benefit the public?
- Does the requested information "fall within the Act's core purpose of shedding light on an agency's performance of its statutory duties?"

FOIA/PRIVACY BALANCING ANALYSIS

Step 3: Balance the public and private interest

- If no public interest, and a privacy interest exits, deny.
- If no privacy interest, and a public interest exists, release.
- If both exist, look to case law/legal advisor.

NON-FOIA REQUESTS

1. Court Orders/Subpoenas

2. State Child Support Agency Requests

COURT ORDERS/SUBPOENAS

- AR 27-40, Litigation, Chapter 7: Release of Information

- AFI 51-301, Civil Litigation (1 July 2002)
  Chapter 9: Releasing Information In Litigation

COURT ORDERS/SUBPOENAS

- **AFI 51-301, paragraph 9.4.4: "…Release documents subject to the Privacy Act**
- **AR 27-40, paragraph 7-7 (b)(1):**
  - With the consent of the individual.

    or

  - Under a court order or subpoena specifically signed by a judge of court of competent jurisdiction.

COURT ORDERS/SUBPOENAS

Two Issues:

- **Is the court order/subpoena issued by a court of competent jurisdiction?**
- **Is the subpoena specifically signed by a judge?**

COURT ORDERS/SUBPOENAS

- A SUBPOENA IS NOT A FOIA
- NEVER IGNORE A SUBPOENA
- IMMEDIATELY CALL YOUR JAG

STATE CHILD SUPPORT AGENCY REQUESTS FOR INFORMATION

May be a “Blanket Routine Use” Release

- See: privacy notice links
  - http://www.defenselink.mil/privacy/notices/army (“Preamble”)
  - http://www.defenselink.mil/privacy/notices/usaf (“Preamble”)

STATE CHILD SUPPORT AGENCY REQUESTS FOR INFORMATION

Law Enforcement Routine Use: If a system of records maintained by a DoD component to carry out its functions indicates a ***violation or potential violation of law, whether civil, criminal or regulatory in nature***, and whether arising by general statute or by regulation, rule or order issued pursuant thereto, ***the relevant records in the system of records may be referred, as a routine use***, ***to the agency concerned, whether federal, state, or locate or foreign, charged with the responsibility of investigating or prosecuting such violation or charged with enforcing or implementing the statute, rule or regulation***, or order issued pursuant thereto.

STATE CHILD SUPPORT AGENCY REQUESTS FOR INFORMATION

- AFI 33-332, paragraph 12.4.7
- AR 340-21, paragraph 3-2
  - **Determine the requesting agency's/person's authority/obligation to investigate or prosecute such violations or its charge to enforce or implement the statute, rule, regulation upon which it is basing its request for Air Force/Army information**
    - **DOCUMENT!!!!!!**
    - **CONSULT YOUR LEGAL COUNSEL**

FREEDOM OF INFORMATION ACT
AGENCIES OF RECORD

CHIEF, NATIONAL GUARD BUREAU - Initial Denial Authority

NGB-JA – Chief, NGB's delegated authority for National Guard records other than:

1. PROCUREMENT/CONTRACT/IMPAC CREDIT CARD RECORDS - Send to: CHIEF, NATIONAL GUARD BUREAU, ATTN: NGB-AQP (MR. BOB BROWN), 1411 JEFFERSON DAVIS HIGHWAY, ARLINGTON, VA 22202-3231. DSN 327-1584/COMM (703) 607-1584

2. INSPECTOR GENERAL RECORDS (ARMY NG CASES) - Send to: OFFICE OF THE INSPECTOR GENERAL, RECORDS RELEASE OFFICE, ATTN: SAIG-ZXR, 2511 JEFFERSON DAVIS HIGHWAY, ARLINGTON, VA 22203-3912. DSN 329-1093/COMM (703) 601 –1093

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3. INSPECTOR GENERAL RECORDS (AIR NG CASES) – Send to: DEPARTMENT OF THE AIR FORCE, 11CS/SCS (FOIA), 1000 AIR FORCE PENTAGON, WASHINGTON, DC 20330-1000. DSN 426-7263/COMM (703)696-7263

4. FINANCIAL/PAY/TRAVEL RECORDS (ARMY NG CASES) Send to: DEFENSE FINANCE & ACCOUNTING SERVICE-INDIANAPOLIS CENTER, DFAS-IN-SU, ROOM 222W(MR. LARRY NORTH), 8899 EAST 56TH STREET, INDIANAPOLIS, IN 46249-0150. DSN 699-7365/COMM (317) 510-7365

5. FINANCIAL/PAY/TRAVEL RECORDS (AIR NG CASES) - Send to: DEFENSE FINANCE & ACCOUNTING SERVICE, DFAS-DCC/DE (ATTN: FOIA), 6760 E IRVINGTON PLACE, DENVER, CO 80279. DSN 926-7514/COMM (303) 676-7514

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6. SAFETY INVESTIGATIONS (ARMY NG CASES) –AIRCRAFT CRASHES,MISHAPS, ETC - Send to: COMMANDER, US ARMY SAFETY CENTER, ATTN: LEGAL/CSSC-SJA, FORT RUCKER, AL 36362-5363 DSN 558-2373/COMM (334) 255-2372

7. SAFETY INVESTIGATIONS (AIR NG CASES) – AIRCRAFT CRASHES, MISHAPS, ETC – Send to: HQ AFSC/JARF, 9700 G AVENUE SE, SUITE 236B, KIRTLAND AFB, NM 87117-5670 DSN 246-1193/COMM (505) 846-1193

8. AR 15-6 INVESTIGATIONS SEND TO NGB-JA (FOIA). HOWEVER, IF REQUESTER REQUIRES IT DUE TO ITS USE IN ADVERSE ACTION,

NATIONAL GUARD BUREAU
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1411 JEFFERSON DAVIS HIGHWAY

ARLINGTON, VA 22202-3231

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WEBSITES

- DOJ FOIA homepage: www.usdoj.gov/foia
- DOJ Office of Information Policy (FOIA Updates): www.usdoj.gov/oip/oip.html
- FOIA Updates: www.usdoj.gov/oip/foiapost/mainpage.htm
- FOIA Guidebook: http://www.usdoj.gov/oip/foi-act.htm
- Various FOIA publications: http://www.defenselink.mil/pubs/foi/
- Electronic Privacy Information Center: www.epic.org
- Army Freedom of Information Act Program: www.rmd.belvoir.army.mil/FOIAMain.htm
- AF Freedom of Information Act Office: www.foia.af.mil